Mohd Bakri bin Belaho v Public Prosecutor

COURT OF APPEAL '(PUTRAJAYA) — CRIMINAL APPEAL NO B-05–58 OF 2000
MOHD GHAZALI, SURIYADI AND HASAN LAH JJCA
5 JANUARY 2007

Criminal Procedure — Appeal — Conviction, against — Defence not raised specifically or otherwise during defence case — Defence that witness could have committed murder raised only at appellate stage — Lack of cross-examination of witnesses by defence

Criminal Procedure — Appeal — Fact, finding of — Whether learned judge erred in accepting as direct evidence witness whom he considered behaved in an unusual way after witnessing incident — Whether sufficiently considered by trial judge

Evidence — Presumption — Failure to call witnesses — Witnesses could not be traced — Whether it gave rise to irresistible inference that, if called, their evidence would be unfavourable — Evidence Act 1950 s 114(g)

The appellant was convicted for the murder of one Aminah bte Bahrah ('the deceased') and was sentenced to death in accordance with s 302 of the Penal Code ('the Code'). The appellant and the deceased and her family, namely, her husband and a child aged about two years old, were tenants of SP8. SP9 was also a tenant in one of the rooms. SP9 testified that on the day of the incident, the deceased's husband, Samsudin brought a visitor, one Jumain to the said house. Jumain later slept in the lounge of the said house. At about 6.30am on the same day, he heard a scream for help while he was in his room. He then peeped through the door of his room and saw the deceased lying on the floor in the lounge area which was lighted, whilst dressed in a yellow dress. The appellant, who had a green towel wrapped around him but was shirtless, was crouching over her and in his left hand was a kitchen knife whilst his right hand was on her throat. Samsudin and Jumain were nowhere to be seen. Fearing for his life, he did not come out of his room but climbed out through the window in his room and ran away to a nearby hill. At about 7.15am the same day, he came back to the said house and saw the deceased lying on the floor of the kitchen dressed in her underwear, namely, a brassiere and panty. There were bloodstains on the floor of the

kitchen and also the lounge area. He did not see the appellant. He then proceeded to SP8's food-stall which was within the vicinity where he was working as a helper. He did not inform SP8 about the incident as he was too scared. He later went back to the said house at around midnight. In her evidence, SP8 stated that at about 2pm on the day of the incident, whilst at her food-stall, she was informed by a neighbour that the deceased's child was crying very loudly. She then went to the said house and saw the deceased lying on the kitchen floor and also saw some bloodstains. She consequently proceeded to the Selayang Police Station and lodged a report. In relation to the evidence of SP9, counsel for the appellant had pointed out that the learned trial judge was of the view that SP9's reaction upon witnessing the crime was 'unusual' and hence the learned trial judge erred in accepting SP9's evidence that he saw what transpired at the material time. In the same vein, learned counsel argued that the learned trial judge was wrong in accepting the evidence of SP9 when SP9 had access to the place of the incident and hence the opportunity to commit the offence himself. Counsel also argued that, in relation to the non-calling of Samsudin, ie, the deceased's husband and the said Jumain by the prosecution, the learned trial judge erred in not applying the presumption under illustration (g) of s 114 of the Evidence Act 1950, viz, that the court may presume that evidence which could be and was not produced would if produced be unfavourable to the person who withholds it, against the prosecution.

Held, dismissing the appeal and affirming the High Court's conviction and sentence:

(1) (per **Mohd Ghazali JCA**) After a careful perusal of the appeal record and the learned trial judge's grounds of judgment the court could not see any merits in this appeal. The learned trial judge had religiously followed what was required of him pursuant to ss 180 and 182A of the Criminal Procedure Code. With regards to these provisions, the court would refer to *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 (see para 26).

(2) (per **Mohd Ghazali JCA**) In relation to the non-calling of the deceased's husband, Samsudin and Jumain as witnesses for the prosecution, s 114(g) illustration (g) provided 'that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it'. The simple reason why the prosecution did not call Samsudin to testify or even offered him as a witness for the defence was that he could not be traced. The police could not serve a subpoena on him to compel his attendance in court. Unless counsel

could show there was a deliberate suppression of evidence, the court could not see how s 114 illustration (g) of the Evidence Act 1950 could be raised here (see paras 27–29).

(3) (per **Mohd Ghazali JCA**) In the court below, the appellant never suggested, as a defence, during the case for the prosecution that SP9 had the opportunity to commit the offence himself neither was such a defence raised specifically or otherwise during the defence case. What was clear from the notes of evidence and minutes of the proceedings was that there was the lack of cross-examination of witnesses by the defence suggesting that SP9 could have been the person who murdered the deceased as he had the opportunity to do so. Further, that SP9 could have been the person who committed the offence was suggested for the first time only at this appeal and not at the trial. The learned judge had expressed his view that SP9's reaction by running away, after he saw what transpired was a bit unusual but reasonable. He was also of the view that SP9 was a not a very intelligent person. Under the circumstances that SP9 was faced with, the learned trial judge opined that his reaction by running away was understandable (see paras 31–32).

(4) (per **Suriyadi JCA**) Admittedly the issue of the non-presence of illegal immigrant witnesses, when required to come forward to testify, could not be divorced from the harsh realities of their wayward world, whence to volunteer evidence would be perceived as a guarantee to a one way passage back to Indonesia at the conclusion of the trial. There was no justifiability in invoking any adverse inference merely on the failure of the prosecution to secure their attendance in court due to this want of co-operation in the circumstances of the case. All these issues were maturely and realistically discussed by the presiding judge and the views were beyond reproach (see para 73).

(5) (per **Suriyadi JCA**) The action and conduct of the appellant, absconding to the south, hundreds of miles away from the scene of the crime, unfortunately to be arrested at Kota Tinggi, Johore Bahru merely strengthened the prosecution's case. The Evidence Act 1950 provided that the conduct of any party to any fact in issue was relevant. In fact the conduct of any person, an offence against whom was the subject of any proceeding, was relevant if the conduct influences any fact in issue or relevant fact, whether previous or subsequent (s 8 of the Evidence Act 1950) (see para 78).

(6) (per **Suriyadi JCA**) Though SP9 did not see the act of the appellant causing the injuries, which caused the eventual death, the cumulative effect of the total circumstantial evidence, pointed unerringly to his guilt (see para 87).

[Bahasa Malaysia summary

Perayu disabitkan dengan pembunuhan satu Aminah bte Bahrah ('si mati') dan dijatuhkan hukuman mati mengikut s 302 Kanun Keseksaan ('Kanun tersebut'). Perayu dan si mati dan keluarganya, iaitu, suaminya dan seorang anak berumur lebih kurang dua tahun, adalah penyewa-penyewa SP8. SP9 juga adalah penyewa di salah sebuah bilik. SP9 memberi keterangan bahawa pada masa kejadian, suami si mati, Samsudin telah membawa seorang pelawat, satu Jumain ke rumah tersebut. Jumain kemudiannya tidur di ruang tamu rumah tersebut. Pada pukul 6.30 pagi hari yang sama, beliau mendengar jerit untuk pertolongan semasa ia berada di biliknya. Beliau kemudian menjenguk melalui pintu biliknya dan nampak si mati berbaring di lantai di ruang tamu yang diterangi, memakai pakaian kuning. Perayu, yang hanya bertuala hijau tanpa baju merangkak atas si mati dan di tangan kirinya memegang sebilah pisau dapur sementara tangan kanannya di leher si mati. Samsudin dan Jumain tidak kelihatan. Oleh kerana takut beliau tidak keluar daripada biliknya tetapi memanjat keluar melalui tingkap biliknya dan lari ke bukit berdekatan situ. Pada lebih kurang 7.15 pagi pada hari yang sama, beliau kembali ke rumah tersebut dan nampak si mati berbaring di atas lantai dapur memakai baju dalamnya, iaitu, coli dan seluar dalamnya. Terdapat tanda-tanda darah di lantai dapur dan juga di ruang tamu. Beliau tidak nampak perayu. Beliau kemudiannya pergi ke gerai makan SP8 yang berada dekat situ di mana ia bekerja sebagai penolong. Beliau tidak memberitahu SP8 akan kejadian tersebut oleh kerana ketakutan. Beliau kemudiannya balik ke rumah tersebut lebih kurang tengah malam. Dalam keterangannya, SP8 menyatakan bahawa lebih kurang 2 petang pada hari kejadian tersebut, semasa berada digerainya, beliau dimaklumkan seorang jirannya bahawa anak si mati sedang menangis dengan kuat. Beliau kemudiannya telah pergi ke rumah tersebut dan nampak si mati berbaring di lantai dapur dan juga nampak tanda-tanda darah. Beliau kemudiannya telah pergi di balai polis Selayang dan membuat satu laporan. Berhubungan dengan keterangan SP9, peguamcara perayu telah menyatakan bahawa hakim perbicaraan yang bijaksana berpendapat bahawa reaksi SP9 apabila melihat kejadian tersebut adalah 'tidak biasa' dan dengan itu hakim yang bijaksana telah terkhilaf dalam menerima keterangan SP9 bahawa beliau telah lihat apa yang telah berlaku pada masa material tersebut. Dalam perkara yang sama, peguamcara yang bijaksana berhujah bahawa hakim yang bijaksana adalah salah dalam menerima keterangan SP9 apabila SP9 mempunyai akses tempat kejadian tersebut dan dengan itu sendiri mempunyai peluang untuk melakukan pembunuhan tersebut. Peguamcara juga berhujah bahawa, berhubungan dengan kegagalan memanggil Samsudin, iaitu suami si mati dan juga Jumain tersebut oleh pendakwa raya, hakim mahkamah yang bijaksana khilaf dalam tidak memakai anggapan di bawah ilustrasi (g) s 114 Akta Keterangan 1950, iaitu, mahkamah dapat

menganggap keterangan yang dapat dan tidak dikemukakan akan sekiranya dikemukakan tidak akan memihak kepada orang yang menahannya, terhadap pendakwaan.

Diputuskan:

(1) (oleh **Mohd Ghazali HMR**) Selepas penelitian rekod rayuan dan mendengar alasan-alasan penghakiman hakim perbicaraan yang bijaksana, mahkamah tidak dapat melihat sebarang merit di dalam rayuan ini. Hakim perbicaraan yang bijaksana telah mematuhi dengan ketatnya apa yang perlu darinya menurut ss 180 dan 182A Kanun Acara Jenayah. Berhubungan dengan peruntukan-peruntukan tersebut, mahkamah ini merujuk kepada *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 (lihat perenggan 26).

(2) (oleh **Mohd Ghazali HMR**) Berhubung dengan kegagalan memanggil suami simati, Samsudin dan Jumain sebagai saksi-saksi untuk pendakwa raya, s 114(g) ilustrasi (g) memperuntukkan 'bahawa keterangan yang dapat dan tidak dikemukakan akan sekiranya dikemukakan tidak akan memihak kepada orang yang menahannya, terhadap pendakwaan'. Alasan yang mudah mengapa pendakwa raya tidak memanggil Samsudin untuk memberi keterangan ataupun menawarkannya sebagai saksi untuk pembelaan adalah kerana beliau tidak dapat dijumpai. Polis tidak dapat menyampaikan subpoena kepadanya untuk memerlukan kehadirannya di mahkamah. Hanya kecuali peguamcara dapat menunjukkan bahawa terdapat peninggalan keterangan secara sengaja, mahkamah tidak dapat melihat bagaimana s 114 ilustrasi (g) Akta Keterangan dapat dibangkitkan di sini (lihat perenggan 27–29).

(3) (oleh **Mohd Ghazali HMR**) Di mahkamah bawahan, perayu tidak pernah mencadangkan, sebagai pembelaan, semasa kes untuk pendakwaan bahawa SP9 mempunyai peluang untuk melakukan jenayah tersebut dengan sendirinya dan pembelaan ini juga tidak dibangkitkan secara spesifik atau sebaliknya semasa kes pembelaan. Apa yang jelas daripada nota-nota keterangan dan minit-minit prosiding tersebut bahawa terdapat kekurangan pemeriksaan balas saksi-saksi oleh pembelaan mencadangkan bahawa SP9 mungkin orang yang membunuh si mati oleh kerana dia mempunyai peluang berbuat demikian. Lanjutan, SP9 berkemungkinan orang yang dapat melakukan jenayah tersebut dicadangkan pada kali pertama hanya di rayuan ini dan bukannya di perbicaraan. Hakim yang bijaksana telah member pandangannya bahawa reaksi SP9 melarikan diri, selepas melihat apa yang terjadi adalah tidak biasa tetapi munasabah. Beliau juga berpendapat bahawa SP9 bukannya seorang yang kecerdikannya di bawah tahap biasa. Dalam keadaan yang SP9

berhadapan dengan, hakim yang bijaksana berpendapat bahawa reaksinya melarikan diri adalah munasabah (lihat perenggan 31–32).

(4) (oleh **Suriyadi HMR**) Adalah benar bahawa isu ketidakhadiran saksi-saksi pendatang haram, apabila diperlukan untuk menghadirkan diri untuk memberi keterangan, tidak boleh diceraikan daripada realiti yang sebenarnya dalam kehidupan liar mereka, di mana jika keterangan diberikan secara sukarela akan nampak seperti jaminan perjalanan sehala balik ke Indonesia selepas tamatnya perbicaraan. Tiada justifikasi menggunakan sebarang inferens menentang hanya kerana kegagalan pendakwa mendapatkan kehadiran di mahkamah oleh kerana tidak adanya kerjasama dam keadaan kes ini. Segala isu-isu ini telah dibincangkan secara matang dan realistik oleh hakim perbicaraan tersebut dan pandangan-pandangannya tidak perlu ditegur (lihat perenggan 73).

(5) (oleh **Suriyadi HMR**) Tindakan dan tingkah laku perayu, dalam melarikan diri ke selatan, beberapa ratus batu daripada tempat kejadian dan ditangkap di Kota Tinggi, Johor Bahru hanya menguatkan kes pendakwa. Akta Keterangan memperuntukkan bahawa tingkah laku seseorang pihak terhadap sebarang fakta dalam isu adalah relevan. Sebenarnya, tindakan sesiapapun, di mana satu kesalahan terhadapnya adalah tajuk sebarang prosiding, adalah relevan sekiranya tindakannya mempengaruhi sebarang fakta dalam isu atau fakta relevan, sama ada sebelum atau selepasnya (s 8 Akta Keterangan 1950) (lihat perenggan 78).

(6) (oleh **Suriyadi HMR**) Walaupun SP9 tidak melihat tindakan perayu mencederakan si mati, yang menyebabkan kematian, kesan kumulatif jumlah keterangan ikut keadaan, dengan jelas menunjukkan kebersalahannya (lihat perenggan 87).]

Notes

For cases on appeal against conviction, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 296–341.

For cases on finding of fact, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 395–469.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2050–2053.

Cases referred to

Adikanda Das v State of Orissa [1988] Cri LJ 1884 (refd)

Balachandran v PP [2005] 2 MLJ 301 (refd)

DA Duncan v PP [1980] 2 MLJ 195 (refd)

Tulshiram v State of Maharashtra [1984] Cr LJ 209 (refd)

Legislation referred to

Criminal Procedure Code ss 112, 180, 182A
Evidence Act 1950 ss 8, 32, 114 illustration (g)
Penal Code ss 300, 302

Appeal from: Criminal Suit No 45–1 of 2000 (High Court, Shah Alam)

Mohamed Haniff Khatri Abdullah (Haniff Khatri) for the appellant.
Mangajarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Ghazali JCA:

[1] The appellant was convicted for the murder of one Aminah bte Bahrah ('the deceased') and was sentenced to death in accordance with s 302 of the Penal Code ('the Code'). The appellant appealed against his conviction to this court. The appeal was dismissed and the conviction affirmed. This was a unanimous decision.

[2] The offence was committed on 27 July 1998 sometime between 5.30am and 6.30am at house No ST 293, Bukit Perwira, Jalan 11, Selayang Baru, Batu Caves, Selangor ('the said house'). There are five rooms in the said house and three of the rooms were rented out separately by the owner, one Jamaliah bte Mohd Yusuff ('SP8'). The appellant was a tenant in one of the rooms. The deceased and her family, namely, her husband named Samsudin and a child aged about two years old, were tenants in another room. One Ahmad bin Jumah and also known as Hassan ('SP9') was also a tenant in one of the rooms. SP8 kept one of the rooms for her own use and the remaining room was used as a store.

[3] In his evidence SP9 testified that at about 12.30am on 27 July 1998, ie, the day of the incident, the deceased's husband, Samsudin brought a visitor, one Jumain to the said house. Jumain later slept in the lounge of the said house. At about 6.30am on the same day, he heard a scream for help while he was in his room, He then peeped through the door of his room and saw the deceased lying on the floor in the lounge area which was lighted, whilst dressed in a yellow dress. The appellant, who had a green towel wrapped around him but was shirtless, was crouching over her and in his left hand was a kitchen knife whilst his right hand was on her throat. Samsudin and Jumain were nowhere to be seen. Fearing for his life, he did not come out of his room but climbed out through the window in his room and ran away to a nearby hill.

A **[4]** At about 7.15am the same day, he came back to the said house and saw the deceased lying on the floor of the kitchen dressed in her underwear, namely, a brassiere and panty. There were bloodstains on the floor of the kitchen and also the lounge area. He did not see the appellant. He then proceeded to SP8's food-stall which was within the vicinity where he was **B** working as a helper. He did not inform SP8 about the incident as he was too scared. He later went back to the said house at around midnight.

[5] In her evidence, SP8 stated that at about 2pm on the day of the incident, whilst at her food-stall, she was informed by a neighbour that the **C** deceased's child was crying very loudly. She then went to the said house and saw the deceased lying on the kitchen floor and also saw some bloodstains. She consequently proceeded to the Selayang Police Station and lodged a report.

D **[6]** In his evidence, Chief Inspector Mohd Fazley Ab Rahman ('SP11'), the investigation officer of the case, testified that he was informed about the incident at about 4pm the same day. He then went to the scene of the crime and found the lifeless body of the deceased covered by a green towel. He noticed that there were wounds to the deceased's neck. He later found a **E** knife without its handle in the kitchen of the said house. He also found another knife and some soaked clothing in a pail in the bathroom. The deceased was later sent to the Kuala Lumpur Hospital for a postmortem to be conducted. SP11 testified that from his investigation, he was of the view that no one else was involved in the crime. He also informed the court that **F** he was not able to serve the subpoena on the deceased's husband, ie, Samsudin as he could not be traced.

[7] Dr Abdul Rahman bin Yusof ('SP6') who was attached to the General **G** Hospital Kuala Lumpur and who conducted the postmortem on the deceased stated in his report that the body of the deceased bore marks of violence which included the following —

(i) a cluster of stab wounds on the right side of the neck just below the pinna and that 'these wounds associated with a linear abrasion at the **H** lower part of the wound extending to the nape of the neck 11.0 x 2.0 cms';

(ii) 'two stab wounds jointed together at the base upper part of the base of the left side of the neck medial 2.5 x 0.5 cms and lateral 3.5 cms with **I** the depth of the wound 4.0 cms directed upwards and inward';

(iii) 'a cluster of 9 incised wounds on back of the head extending downwards to the neck; the upper most 10.0 x 1.0cms (depth 1.0 cms) joint with second wounds 4.0 x 1.0 cms. The third, fourth and fifth wounds jointed together on the average 7.0 x 1.0 cms (1.5 cms depth), the sixth

wound 3.5 x 0.5 cms (1.0 cm depth), the seventh and eighth wound were 7.0 x 0.5 cms (1.0 cms depth), the ninth wound (lowermost) across the middle part of the nape of the neck 10.0 x 1.0 cms (1.0 cms depth). These wounds were associated with 7 superficial cuts running parallel across the neck each on the average 7.0 x 0.2 cm';

(iv) 'the left jagular [*sic*] vein was completely severed and these associated with partially severed the left common carotid artery'.

[8] SP6 testified that 'in combination, all these wounds will give rise to severe bleeding and will give rise to fatal haemorrhage causing the death'. He also opined as follows:

> All the stab wounds and slash wounds can cause severe bleeding. Most of the injuries were caused by weapon. Abrasion, bruises and fracture of chin could have been caused by a blunt trauma. I did not find any foreign body in the body. From the nature of the injuries, the weapon consistent with the injuries is a sharp-pointed cutting object e.g. kitchen knife. The weapon that cause slash wound is heavier, sharp, cutting object eg parang.
>
> These are the likely weapons consistent with pattern/nature of injuries.
>
> My conclusion and my examination reveal this healthy lady had sustained multiple injuries including incise and stab wound which given rise to massive bleeding/haemorrhage. In my opinion the cause of death is directly attributed bleeding as a result of those injuries.

[9] Sergeant Major Hassan bin Zakaria ('SP4') testified that the appellant was arrested the next day, ie, 28 July 1998 in Felda Linggui, Kota Tinggi, Johor and subsequently brought to Kuala Lumpur.

[10] In his evidence Dr Chong Sai Ho ('SP7'), a medical officer attached to theKuala Kubu Baru Hospital stated that he examined the appellant on 30 July 1998. He testified that he found the following injuries on the appellant's body; he said:

> Injuries on the knees and thigh could be caused by scratches. The laceration wound on the palm were very superficial, edges clear and straight. In my opinion they were caused by sharp object.
>
> [Refer P 4 L(2)] — laceration on palm — this object (broken glass) can cause the injury.
>
> Injuries are unlikely to be self inflicted.
>
> Position of patient and person who cause the scratches on the thigh, I would say face to face. It is possible that the person causing the injuries be lying down and the patient (accused) was squatting/bending on top of the (*sic*) that person.
>
> A kitchen knife can give laceration on the palm by a sharp kitchen knife in self-defence.

A Scratch marks on both limbs — can be caused by nails/scratching by the opposite party.

[11] At the conclusion of the case for the prosecution and after hearing B submissions proffered by the learned deputy public prosecutor and learned counsel for the appellant, the learned trial judge ruled that the prosecution has made out a *prima facie* case against the appellant on the offence charged and consequently called upon the appellant to enter on his defence. The learned trial judge's transcript of the notes of proceedings in relation to C this read as follows:

Pendakwa berjaya membuktikan kes prima facie seperti pertuduhan. OKT dipanggil membela diri seperti pertuduhan.

D **[12]** The appellant elected to give evidence on oath. In his evidence-in-chief, he stated that at about 6am on the morning of the day of the incident, he heard some voices in the deceased's room and saw that the door to her room was ajar. He peeped into the room and saw the deceased E dressed in her underwear and a shirtless male person. The said male person suddenly attacked him with a knife and stabbed him. He managed to grab the knife but the said male person kicked his hand. He took flight but was stabbed in his buttocks and when he turned around was stabbed in his thigh. He then ran to his room. The said male person told him to stay in his room F and threatened that he will kill him if he leaves the room. After the said male person was no longer around, he went to his nephew's house in Johor. He was later arrested by the police.

[13] Under cross-examination, the appellant denied having quarreled with G the deceased in the lounge of the said house on the morning of the day of the incident. He stated that when he went to the bathroom to take a bath, he was wearing a green towel and did not see anyone in the lounge. He also stated that the deceased's husband, Samsudin and the said Jumain had by then left for work. He denied that he stabbed the deceased.

H

[14] In re-examination, the appellant testified that when he got up in the morning on the day of the incident, the said Jumain had left for work as he was not in the lounge area of the said house. He later said he presumed that I the said Jumain had left for work. However, he also said that he heard the said Jumain's voice coming from the direction of the deceased's room. In relation to the laceration wound on his hand, he claimed that that wound was inflicted by a knife used by the said Jumain. He also said he went to SP9's room but the latter was not in. This was how he put it:

Bila saya bangun pagi Jumain telah pergi kerja sebab dia tak ada di ruang tamu. Dalam bilik Aminah, saya dengar suara Jumain.

Saya anggap dia sudah pergi kerja.

Luka ditangan — saya dapat kerana pisau yang diguna oleh Jumain menikam saya. Saya tangkap pisau itu, dia tarik. Saya pergi ke bilik Hassan. Hassan tak ada. Bilik itu kosong.

[15] At the conclusion of the trial, after considering all the evidence before him, the learned trial judge found that the prosecution has proved its case beyond reasonable doubt and consequently found the appellant guilty of the offence of murder as charged and convicted him. In relation to the defence case, he said:

Keterangan tertuduh sebagai pembelaan adalah jelas satu pembohongan. Ia tidak perlu dianalasis dengan panjang lebar. Ia bukan sahaja tidak menimbulkan apa-apa keraguan terhadap kes pendakwaan, malah menguatkannya.

[16] The appellant appealed.

[17] Before this court, counsel for the appellant argued that the learned trial judge failed to undertake a maximum evaluation of the evidence adduced at the close of the case for the prosecution and had applied the wrong standard of proof.

[18] In relation to the evidence of SP9, counsel pointed out that the learned trial judge was of the view that SP9's reaction upon witnessing the crime was unusual, namely, he left the said house through the window of his room and ran away to hide and when he returned, after seeing the body of the deceased in the kitchen, he went to work at SP8's stall but did not inform SP8 or anyone else about the incident. In relation to the incident, counsel argued there was no evidence that the place where the incident took place was lighted and hence the learned trial judge erred in accepting SP9's evidence that he saw what transpired at the material time. In the same vein, counsel argued that the learned trial judge was wrong in accepting the evidence of SP9 when SP9 had access to the place of the incident and hence the opportunity to commit the offence himself.

[19] Counsel also argued that, in relation to the non-calling of Samsudin, ie, the deceased's husband and the said Jumain by the prosecution, the learned trial judge erred in not applying the presumption under illustration (g) of s 114 of the Evidence Act 1950, viz, that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it, against the prosecution.

[20] Finally, counsel argued that the learned trial judge never considered the appellant's defence and just came to the conclusion that his defence was based on lies and does not raise any reasonable doubt on the prosecution's case.

[21] I cannot find any basis for counsel to argue that the learned trial judge failed to undertake a maximum evaluation of the evidence at the close of the case for the prosecution and had applied the wrong standard of proof.

[22] The appellant was charged with murder and hence the prosecution must prove the following ingredients:

(i) that the death of Aminah bte Barah, viz, the deceased had taken place;

(ii) that her death had been caused by or in consequence of the act of the appellant; and

(iii) such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused her death.

[23] It is not in dispute that the first ingredient has been proved. With regards to the second and third ingredients the prosecution has adduced the following evidence:

(i) the deceased, the appellant and SP9 were residing in the said house, albeit in different rooms;

(ii) on the morning of the incident, SP9 heard a scream and upon peeping through the door to his room saw the following:

(a) the deceased was lying on the floor in the lounge area of the said house which was lighted, whilst dressed in a yellow dress; and

(b) the appellant, who had a green towel wrapped around him but was shirtless, was crouching over her and in his left hand was a kitchen knife whilst his right hand was on her throat;

(iii) Samsudin, the deceased's husband and his friend, Jumain were nowhere to be seen at that material time;

(iv) fearing for his life, SP9 did not come out of his room but climbed out through the window to his room and ran away to a nearby hill;

(v) when SP9 came back to the said house he saw the deceased lying on the kitchen floor dressed only in her brassiere and panty and saw bloodstains on the kitchen floor;

(vi) SP9 then proceeded to SP8's stall where he worked as a helper and did not inform anybody about the incident;

(vii) later, SP8, upon being informed by a neighbour that the deceased's child was crying very loudly went to the said house and found the deceased lying on the kitchen-floor and saw bloodstains on the floor;

(viii) upon being informed of the incident, the investigation officer of the case, SP11 went to the said house and found the lifeless body of the deceased covered by a green towel; he noticed that there were wounds to the deceased's neck and in the course of investigation found two knives;

(ix) SP6, the doctor who conducted the postmortem found several stab wounds on the deceased's neck and also found that her jugular vein was completely severed; he testified that his examination revealed that the deceased sustained multiple injuries including incise and stab wounds which has given rise to massive bleeding/haemorrhage and opined that the cause of death was "directly attributed to bleeding as a result of those injuries"; he was of the view that most of the injuries were caused by a weapon and the weapon consistent with the injuries was a sharp-pointed cutting object, e.g., a kitchen knife;

(x) the appellant was arrested in Johor on the following day;

(xi) SP7, the doctor who examined the appellant after his arrest testified that he found certain injuries on the appellant's body which he opined were caused by a sharp object and that these injuries were unlikely to be self-inflicted; he also found scratch-marks on both his limbs and opined that they could have been caused by fingernails.

[24] In his grounds of judgment, the learned trial judge after laying down the evidence of the various witnesses in detail and highlighting his perception of the facts before him, found that a *prima facie* case has been made out against the appellant on the offence charged, viz, murder under s 302 of the Code and hence called upon the appellant to enter on his defence; he said (at p 91 of the appeal record) as follows:

> Apa yang penting ialah menimbang daripada keterangan yang ada sama ada di peringkat pendakwaan menutup kesnya terdapat satu kes prima facie untuk tertuduh menjawab pertuduhan terhadapnya.
>
> Saya berpuashati bahawa pendakwaan, di akhir kesnya, berjaya membukti pada tahap prima facie bahawa tertuduh melakukan kecederaan-kecederaan ke atas si mati yang menyebabkan kematiannya dan bahawa ia dilakukan dengan niat membunuh, atau dalam kata-kata lain membuktikan pada tahap prima facie semua ingredient kesalahan seperti pertuduhan dan dikehendaki oleh s 300 Kanun Keseksaan.
>
> Maka saya memanggil tertuduh membela diri seperti pertuduhan.

[25] The appellant elected to give evidence on oath. At the conclusion of the trial, as discussed earlier, the learned trial judge found that the prosecution has proved its case beyond reasonable doubt and found the appellant guilty of the offence of murder as charged and convicted him.

[26] After a careful perusal of the appeal record and the learned trial judge's grounds of judgment I cannot see any merits in this appeal. The learned trial judge has religiously followed what was required of him pursuant to ss 180 and 182A of the Criminal Procedure Code. With regards to these provisions, I would refer to *Balachandran v Public Prosecutor* [2005] 2 MLJ 301. In delivering the judgment of this court, Augustine Paul JCA (as he then was) said (at pp 314–316):

> As the offence in this case was committed in 1998 the burden of proof on the prosecution is governed by ss 180 and 182A of the Criminal Procedure Code as amended in 1997 ('s 180' and 's 182A' respectively). They read as follows:
>
> Section 180
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> Section 182A
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.
>
> Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case while s 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the

background of the meaning of the phrase '*prima facie* case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out while s 180(3) provides that if a *prima facie* case has been made out the accused shall be called upon to enter his defence. A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase '*prima facie* case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary,* (11th (Ed) as:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be ove‴rthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a

consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[27] In relation to the non-calling of the deceased's husband, Samsudin and Jumain as witnesses for the prosecution, the learned trial judge said as follows:

> Ketidakhadiran Samsudin, suami si mati tidaklah mencacat kes pendakwaan atau boleh membangkitkan andaian sebaliknya di bawah s 114(g) Akta Keterangan 1950. Keterangan dikemukakan bahawa dia telah 'dilarikan' oleh empat orang lelaki beberapa minggu selepas isterinya dibunuh. Dalam 'kehidupan liar' warga Indonesia, baik di negara mereka atau di sini tidaklah menghairankan jika dia juga telah 'lenyap'.
>
> Saya juga berpendapat bahawa kegagalan memanggil Jumain juga tidak mencacatkan kes pendakwaan. SP11 memberi keterangan bahawa dia tidak siasat Jumain kerana mengikut Samsudin (suami si mati) Jumain telah balik ke Tanjong Malim. Saya akui bahawa beliau sepatutnya berbuat lebih dari itu dan mengatakan sesuatu yang lebih dari itu. Tetapi, soalnya adakah kegagalan mencari Jumain itu (kita mesti ingat dia juga seorang pendatang, 'tanpa izin' atau tidak kita tidak tahu) menyebabkan timbulnya keraguan ke atas kes pendakwaan. Ini mesti dilihat dari keseluruhan keterangan yang ada. Mengikut pertimbangan saya tidak.

With regards to this issue, SP11 testified that he had in the course of investigation recorded a statement from Samsudin but subsequently was unable to serve a subpoena on him as he could not be traced. One Inspector Mohd Razali Taib (SP12) also testified that he was unable to trace Samsudin. In relation to Jumain, SP11 said he was informed earlier by Samsudin that Jumain had gone back to Tanjong Malim. He also said he did not carry out an investigation on Jumain.

[28] Under the above circumstances, I cannot see the relevance of counsel canvassing that s 114 illustration (g) of the Evidence Act 1950 would apply. Section 114(g) illustration (g) provides 'that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it'. The simple reason why the prosecution did not call Samsudin to testify or even offer him as a witness for the defence was that he could not be traced. The police could not serve a subpoena on him to compel his attendance in court.

[29] Further, I cannot think of any reason why the prosecution would want to withhold him from coming to court to testify. At the time of the incident

SP9 had seen only the appellant with the deceased. The appellant himself said when he got up in the morning, Samsudin had gone to work as he was not in the lounge. In relation to Jumain, SP11 testified that he did not carry out an investigation on the former. This would denote that SP11 has never met Jumain in the course of his investigation and hence never recorded a statement from him. Unless counsel can show there was a deliberate suppression of evidence, I cannot see how s 114 illustration (g) of the Evidence Act 1950 can be raised here.

[30] In relation to the evidence of SP9, counsel for the appellant had pointed out that the learned trial judge was of the view that SP9's reaction upon witnessing the crime was 'unusual', namely, he left the said house through the window of his room and ran away to hide and when he returned, after seeing the body of the deceased in the kitchen, he went to work at SP8's stall but did not inform SP8 or anyone else about the incident. In relation to the incident, counsel argued there was no evidence that the place where the incident took place was lighted and hence the learned trial judge erred in accepting SP9's evidence that he saw what transpired at the material time. In the same vein, learned counsel argued that the learned trial judge was wrong in accepting the evidence of SP9 when SP9 had access to the place of the incident and hence the opportunity to commit the offence himself.

[31] I find it difficult to comprehend the last part of the submission above. In the court below, the appellant never suggested, as a defence, during the case for the prosecution that SP9 had the opportunity to commit the offence himself neither was such a defence raised specifically or otherwise during the defence case. What is clear from the notes of evidence and minutes of the proceedings is that there was the lack of cross-examination of witnesses by the defence suggesting that SP9 could have been the person who murdered the deceased as he had the opportunity to do so. Further, that SP9 could have been the person who committed the offence was suggested for the first time only at this appeal and not at the trial. In the court below the appellant testified that he heard Jumain's voice coming from the direction of the deceased's room that morning and that the wound on his hand was inflicted by a knife used by Jumain which, to me, would seem to be that the appellant was suggesting that it was Jumain who had the opportunity to inflict the injuries on the deceased.

[32] Counsel also submitted before this court that the learned trial judge never considered the appellant's defence. He argued that the learned trial judge just came to the conclusion that the defence was based on lies and does not raise any reasonable doubt on the prosecution's case. With due respect to counsel, I cannot see any merit or any basis for this argument. In his grounds of judgment, the learned trial judge dealt at length with the evidence of SP9.

He expressed his view that SP9's reaction by running away, after he saw what transpired in the lounge area of the said house on the day of the incident, was a bit unusual but reasonable. He was also of the view that SP9 was a not a very intelligent person. Under the circumstances that SP9 was faced with, the learned trial judge opined that his reaction by running away was understandable. He said (p 87 of the appeal record):

> Melihat wataknya, alasannya bahawa dia adalah bertindak sedemikian rupa adalah munasaba, bagi orang sepertinya. Juga adalah munasabah jika kita ambil kira keadaan tertuduh semasa dilihatnya sedang memegang pisau itu. Memandangkan banyak dan teruknya luka-luka di badan si mati, seorang perempuan yang semesti tidak mampu melawan, adalah munasabah mengandaikan bahawa tertuduh pada masa itu seperti seorang "amok" yang sudah hilang pertimbangan sama sekali. Dalam keadaan itu, berkemungkinan besar sesiapa sahaja yang country-regionplacecuba menghalangnya akan diterkamnya. Dalam keadaan itu dan melihat watak SP9, tindakannya bolehlah difahami.

[33] The question that the learned trial judge had to answer at the conclusion of the trial was whether on the totality of the evidence, adding them together and considering them altogether, lead to the irresistible conclusion that it was the appellant who committed the crime. The evidence clearly showed that it was the appellant who committed the crime and that the learned trial judge was correct in arriving at the decision that he did when he called on the appellant to enter on his defence. On the face of the record at the close of the case for the prosecution, it is clear that a case under s 302 of the Code has been made out against the appellant. The evidence links the appellant with the act of killing and establishes the offence charged.

[34] At the conclusion of the trial, the evidence in its totality confirmed in material particulars that it was the appellant who murdered the deceased. No miscarriage of justice has occurred in this case and hence the appeal was dismissed. The conviction and sentence were affirmed.

Suriyadi JCA:

[35] The appellant, one Mohd Bakri bin Belaho, was charged for murder under s 302 of the Penal Code. The charge reads:

> Bahawa kamu pada 27 Julai 1998 jam lebih kurang 5.30 hingga 6.30 pagi di rumah bernombor ST 293, Bukit Perwira, Jalan 11, Selayang Baru, Batu Caves, di dalam Daerah Gombak dalam Negeri Selangor Darul Ehsan, telah melakukan pembunuhan ke atas Aminah bte Bahrah, dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan (Akta 574).

[36] In English, and to put things in perspective, the date of the offence was 27 July 1998 with the time being in and about 5.30am to 6.30am. The place was at ST 293, Bukit Perwira, Jalan 11, Selayang Baru, Batu Caves and the victim being Aminah bte Bahrah ('the deceased'). The prosecution had called 13 witnesses to establish its case, and at the end of the trial, the learned tial judge had found the appellant guilty as per the charge and sentenced him to death by hanging.

[37] The appellant had subsequently filed an appeal. The appeal was founded on the following grounds, inter alia that the judge had:

(i) erred in accepting SP9's evidence as direct evidence categorized as beyond reasonable doubt;

(ii) had accepted SP9's evidence even though he had behaved in an unusual way after witnessing the incident;

(iii) accepted the evidence of SP9 identifying the appellant even though there was no evidence of the relevant area being sufficiently lighted;

(iv) erred as SP9 had equal opportunity to kill the deceased;

(v) erred in being swayed by the appellant going to Kota Tinggi with a hand injury;

(vi) erred in not invoking s 114 (g) the Evidence Act 1950 against the prosecution for not calling the husband and another witness whence they were around the vicinity;

(vii) erred when admitting the husband's statements under s.32(1) of the Evidence Act 1950, which were prejudicial to the appellant;

(viii) erred in not giving the benefit of the doubt to the appellant, by the admitted failure of the prosecution to dust for fingerprints, and failing to investigate the ownership of a crash helmet seen in the photographs; and

(ix) had invoked the wrong burden of proof.

[38] The appeal was heard by this panel and at the end of the hearing was dismissed. I now supply the reasons for its dismissal.

[39] As said above, the prosecution had called 13 witnesses to establish its case and they are as follows. The first witness SP 1, a police personnel works at the inquiry section at the Selayang police station. On 27 July 1998 at about 2.50pm, a lady by the name of Jamaliah bt. Mohd (SP8) had reported to him that she had seen traces of blood splattered around house number ST 293 Lembah Mutiara, Bukit Perwira at Selayang. He had later transmitted the information to Chief Inspector Yeow Wan Long ('SP10').

[40] The second witness SP2 was a photographer attached to the Selayang police station. On 27 July 1998 at about 5pm he went to ST 293 Kampung Lembah Mutiara at Selayang together with Inspector Fazley bin Abdul Rahman ('SP11') and there on instruction had taken 41 photographs (P3 (1)-(41)) of the scene of a murder. In the morning of 28 July 1998 at the office of Inspector Fazley he took a further seven photographs of exhibits (P3 (42) A-(48)) connected to the said murder. He also later took 32 photographs (P3 (49)-(80)) of the post mortem. These photographs and the negatives were tendered into court by him in the course of the hearing.

[41] The third witness ie SP3 is a storekeeper of the exhibits' room at the Gombak IPD. On 23 April 1999 he had received and had stored the exhibits connected to this case. When he received them, viz. 13 envelopes, 5 bottles, a tube and 4 plastic packages, they were all sealed with the Jabatan Kimia seal and were intact.

[42] The fourth witness ie SP4, on 28 July 1998 was in charge of the police station at Batu 4, Kota Tinggi, Johore. On that day at about 9am he had received a telephone call from a member of the public, reporting of an Indonesian behaving suspiciously at Felda Linggiu, Kota Tinggi. He had thereafter proceeded to that location. On arrival he was informed that a member of the RELA had arrested an Indonesian citizen, called Mohd. Bakri bin Baleho, his name derived from his identification card. In court he had identified the appellant as that Indonesian.

[43] On physical examination of the appellant he had found a plaster which covered a cut on his hand. He had later rearrested the appellant. After making some enquiries, which led all the way to the Selayang police station, he finally was connected to Inspector Fazley (SP11). He later handed the appellant over to one Sergeant Major Zaleha from Selayang IPD.

[44] The fifth prosecution witness was a chemist attached to the Department of Chemistry at Petaling Jaya. He had worked for the Government for the past 23 years. On 6 August 1998 after having received 23 items, all sealed and labeled with the name of Mohd Bakri, he had examined them. Amongst the items were a plastic bag (marked 'I') containing a chopper bearing six strands of hair, a plastic bag containing a knife without a handle (marked 'J'), a plastic bag (marked 'K') containing a black handle which fitted the knife in 'J', a plastic bag (marked 'L') containing a piece of broken glass bearing eight strands of hair, and a bottle (marked 'N') containing a specimen of head hair. On analysis of the exhibits, he found in some of the exhibits e.g. cotton wool pieces (marked 'A-C'), clothes (marked 'D-G'), a towel (marked 'H'), the knife (marked 'J'), and glass piece (marked 'L') blood stains of the B group type. Regretfully, even though the chopper

(marked 'I') bore human blood stains, he failed to group them. He opined that the hair strands on chopper 'I' and glass pieces marked 'L' could have originated from the hair in 'N' labeled Aminah bte Bahrah. The blood specimen which carried the name of Aminah bte Bahrah (marked 'O') was analysed to be of the B group.

[45] The sixth witness ie SP6, a consultant at the Forensic Medicine Hospital, Kuala Lumpur who had worked at the Kuala Lumpur Hospital since 1979, had examined the body of Aminah bte Bahrah. In his testimony he had concluded that many of the injuries were consistent with injuries inflicted during life. He found presence of hemorrhage and bruises also consistent with injuries during life; as regards the internal examination there was no abnormality of disease detected. At the early stages of the hearing he had testified that fatal hemorrhage was due to:

(1) the wounds on the neck in particular No 11 had severed/cut left jugular vein and partially cut left carotil artery;

(2) presence of bleeding on the surface of the brain; and

(3) multiple open wounds.

In combination, all these wounds will give rise to severe bleeding and will give rise to fatal hemorrhage causing the death.

[46] As regards the wounds, he had testified that all the stab wounds and slash wounds could cause severe bleeding, with most of the injuries caused by some weapon. From the nature of the injuries, the weapon consistent with the injuries was a sharp-pointed cutting object eg a kitchen knife. In this case the broken knife could have caused the stab wounds. He believed that the weapon which had caused the slash wound was sharp, heavier, and for cutting objects eg a parang whereupon he had opined that the chopper could have caused the incised wounds.

[47] He had concluded that the deceased had sustained multiple injuries, giving rise to massive bleeding, with the cause of death directly attributable to it. The lapse of time between the injuries and death would be fast, as it would take only a few minutes, especially after the main vessel to the head at the neck had been cut.

[48] The seventh witness is another doctor who had examined the appellant and had found injuries on the knees, thighs and laceration wound on the palm. He had testified that a sharp kitchen knife could have caused the laceration on the palm. This witness had also expressed the view that the scratches on the thighs of the appellant took place when he was face to face

with the person who had scratched him. It was possible that that person was lying down and the appellant was squatting or bending on top of the former.

[49] The eighth witness was the house owner of No. ST 293, Bukit Perwira, Jalan 11. Selayang Baru. She had testified that the house had five rooms, one each rented out to the deceased and her family, the appellant, and a person called Ahmad Jumah (SP 9), with the other two being left unoccupied. This witness had testified that on 27 July 1998 at about 2pm she was informed that the deceased's child was crying incessantly. On being told of that, she had returned to the above house, where she met the child. After making certain enquiries from her, through the kitchen door she saw the deceased lying on the floor, prompting her to report to the police of what she had seen.

[50] She also testified that Ahmad Jumah (SP9) whom she referred to as Hassan, worked as her shop assistant, and had come to work on that day either at 7pm or 8pm. He had told her nothing when at work.

[51] SP9, the ninth witness for the prosecution testified that in July 1998 he had rented one of the rooms at ST 293, Bukit Perwira, Jalan 11, at Selayang Baru. His immediate neighbours were the deceased who stayed with her family in one of the rooms, and the appellant in another.

[52] He had testified that on the morning of 27 July 1998 he had heard a scream crying out for help from the lounge. Without opening the door, he had peeped through it, and saw the appellant holding a kitchen knife on his left hand. The knife was quite similar to P4J (2). The deceased who was in a yellow dress was lying on the ground. The appellant was seen by him in the posture of crawling ('merangkak') on top of the deceased, with his right hand holding the neck of the deceased. He was then shirtless and only wrapped in a green towel. No one else was at the lounge. He could see well as the light from the lamp was bright.

[53] As he was in fear he had exited through the window and had immediately run all the way up to the top of the hill. He descended and reentered the house through the front door at about 7.15am. This time he found the deceased at the kitchen but only in her underwear and brassiere. She was not moving. Apart from the deceased there was no one else in the house. He thereafter grabbed his shirt and went straight to SP8's shop. At the shop he said nothing to SP8.

[54] During the cross-examination he had cleared the deceased's husband, one Shamsuddin and his cousin Jumain who came for a visit the night before, of their involvement in the murder, when he testified that they were not in

the house at the time of the incident. When suggested to him by the appellant's counsel he had denied that he had attempted to 'disturb' the deceased with Jumain.

[55] The 10th witness for the prosecution, SP10, was the officer in charge of the police station of Selayang. At about 3.50pm on 27 July 1998 he was informed by SP1 of a complaint by a Malay lady of having seen large traces of blood in a house at Kampong Lembah Mutiara, Selayang. He then went to the house numbered as T 293. Blood was all over the place and when he followed the trail of blood to the kitchen, he found a dead woman there, suspected of being a victim of murder. Refraining from touching anything he then telephoned the Criminal Division to take over the investigation.

[56] SP 11 was the 11th witness for the prosecution, and on 27 July 1998 was the duty criminal investigating officer at the Selayang police station. On that date he had received a call pertaining to a murder at ST 293, Kampung Lembah Mutiara, Bukit Perwira, at Selayang, whereupon he had proceeded to the scene of the murder. There he carried out an investigation as ordered by his superior, one Assistant Superintendent Chen. He admitted ordering SP2 to snap photographs at the necessary places and the relevant exhibits as per the tendered pictures. He saw blood splattered about and things strewn around, in the like of broken glasses, handle of a knife etc. at the lounge. In the kitchen he saw the body of the deceased, covered with a green towel, wearing underwear and brassiere only. He collected and packed all the relevant exhibits in the like of a stainless knife, clothes etc., in plastic packages, and thereafter took them to the office. He then instructed the corpse to be taken to the Kuala Lumpur General Hospital for a post mortem, of which was carried out the next day. He received information of the arrest of the appellant whilst in the midst of the postmortem and had accordingly made arrangements to transport the appellant to Kuala Lumpur. He had also ordered samples of hair, blood, toe nails of the deceased and other items gathered during the investigation to be sent to the Chemist Department, to be retrieved later by one L/kpl Liyana. He met the appellant on 29 July 1998 and immediately took him to the Kuala Kubu Baru hospital for a physical medical examination.

[57] During his testimony, he clarified that he was unable to serve the witness subpoena on Shamsudin bin Salahudin (husband of the deceased) as he was informed by one Inspector Razali that he had been kidnapped, as per Rawang Report 4262/98. SP 11 had also testified that he had recorded a witness statement (section 112 of the Criminal Procedure Code) from him. Noticeably, as reflected from the notes of proceedings, the appellant had not objected to it being tendered. Much of Shamsudin's statement inter alia, revolved around the overnight stay of his guest, one Jumain, and his personal

movements the next morning. SP 11 had tendered and read out Shamsudin's statement and the pertinent portion reads:

> Pada 26 Julai 1998, jam lebih kurang 9.30 malam, saya balik dari Tanjong Malim bersama Jumain untuk bermalam di rumah saya. Jumain adalah saudara saya yang bekerja di Tanjung Malim sebagai buruh binaan... saya pun kunci bilik tidur dan kami semua pun tidur.... Pada jam 5.00 pagi, saya bangun dari tidur dan saya kejutkan Jumain dan saya nampak bilik Deng Mohamad dan Hassan tutup. Saya terus mandi serta menyiapkan diri untuk pergi kerja dengan Jumain. Pada jam 5.30 pagi saya kejutkan isteri saya dan bagitahu saya hendak pergi kerja. Isteri saya menjawab 'ya'. Saya pun keluar bersama Jumain pada jam 5.30 pagi untuk pergi kerja di Sri Petaling. Semasa keluar saya tutupkan pintu bilik tidur saya samada ada kunci atau tidak oleh isteri saya saya tidak tahu. Masa itu Hassan dan Deng Mohamad berada di dalam bilik masing. Saya dan Jumain pergi kerja naik bas...

[58] In a gist this portion of the statement established that Shamsudin (husband of the deceased) and Jumain had already left the house when the murder took place. SP12, the last prosecution's witness had testified that Shamsudin, the deceased's husband, had been kidnapped and an investigation paper (IP) accordingly had been opened up. From his investigation he found that Shamsuddin had been kidnapped by four bogus policemen who had come dressed in civilian clothes. Todate not only has Shamsuddin remained untraced but no successful arrest of any of the kidnappers has taken place.

[59] At this stage, it would be quite useful if s 302 of the Penal Code were reproduced and in the course of it, where necessary, to offer some explanation. This section reads:

> Whoever commits murder shall be punished with death

[60] Under s 300 it is promulgated that:

> Except in the cases hereinafter excepted, culpable homicide is murder-
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[61] So, was the act complained of murder and was the appellant the murderer? In the current case it was not disputed that bodily injuries were present, some of them being wounds to the neck, bleeding on the surface of the brain and multiple wounds in the like of stab and slash wounds.

[62] I now touch on some of the specific injuries found and intended to be inflicted and their effects. SP6, the doctor who performed the post mortem at the earlier stages of his examination had stated that 'all the stab wounds and slash can cause severe bleeding (RR26).' Pertaining to the neck injury he was equally specific when he had stated that, 'Lapse of time between injuries and death. This is considered fast, it takes only a few minutes especially after the main vessel to the head (at the neck) is cut (RR 28).' At the tail-end of the examination-in-chief this witness, who was a consultant at the Forensic Medicine Hospital, in Kuala Lumpur had testified:

> My conclusion and my examination reveal that this healthy lady had sustained multiple injuries including incise and stab wound which gave rise to massive bleeding/hemorrhage.
>
> He then had concluded that fatal hemorrhage was due to —
>
> 1 the wounds on the neck in particular no. 11 had severed/cut left jugular vein and partially cut left carotil artery;
>
> 2 presence of bleeding on the surface of the brain; and
>
> 3 multiple open wounds
>
> In combination, all these wounds will give rise to severe bleeding and will give rise to fatal hemorrhage causing the death (AR 25)

[63] I was thus satisfied that the injuries were sufficient here in the ordinary course of nature to cause death. It is my view that by the very nature of the wounds, the motive of the appellant was not limited to the mere sadistic pleasure of frightening the deceased, but to severe her neck. Here the jugular vein had been sliced and parts of the carotil artery had also been severed. There was no denial that death would have been guaranteed merely from the wounds of the severed jugular vein, let alone from the combination of all the wounds, which had given rise to severe bleeding, followed by fatal hemorrhage.

A **[64]** As a point of clarification, to qualify to fall within the heading of murder, the said sufficiency must lead to the high probability of death in the ordinary course of nature. Therefore when this sufficiency exists and death follows as in this case, and the causing of such injuries was intended then the offence of murder would have been committed. All the above pertinent
B findings, had also in crystal clear terms, been laid down in the talking grounds of judgment, adequately reflecting that His Lordship had meticulously considered the evidence before him (AR 82–85). The above medical evidence was prognosed and considered together with the contributive evidence as imparted by SP7.
C

[65] The above is as regards the injuries. I now touch on the issue of the weapons involved. What then was used when causing the injuries? SP9 had testified that he had seen the appellant holding a knife, when on top of the
D deceased person, while at the same time holding the neck with the other hand. The police when conducting the investigation had, amongst others seized a loose handle of a knife at the lounge, pieces of broken glass, two knives one without a handle at the kitchen, and a chopper retrieved from a water container.
E

[66] SP5, a chemist by occupation failed to detect any blood stains on the loose knife handle or for that matter on the glass. He testified that he had found the deceased's hair on the chopper. The forensic expert ie SP6 had affirmed that the chopper could give rise to incise wound though not a stab
F wound but had agreed that the knife without the handle could cause the stab wound. What could not be denied was that the chopper, which had strands of the deceased's hair, was one of the weapons used to subdue the deceased person and which eventually led to her demise. What could not be disputed too was that there were stab wounds found on the body of the deceased.
G

[67] A cursory inspection of the pictures of the formidable chopper, or knife without the handle, would give the shivers to anyone. The irresistible inference would be that whichever weapon was used, with the chopper being
H the probable one as it had the deceased's hair and suitable to 'sembelih' her (to allude to the judge's words), the irresistible inference must be that there was an intention to kill the deceased.

[68] Combining the effect of the weapons used in the incident, together
I with the nature of the wounds inflicted, the part of the body on which the injuries were inflicted, with the probability of death resulting being high, everything pointed to an intention to cause death or injury sufficient in the ordinary course of nature to cause death. From the severity of the wounds as caused by that chopper and the other knife for stabbing purposes, the

appellant could not now come forward and say that he was unaware that those wounds would in all likelihood have caused death, let alone that they were accidental or unintended.

[69] We now broach the subject of the identity of the murderer and visualize what actually happened at the relevant time. For this I have to sift through the entire evidence adduced by the prosecution especially the testimonies of SP8 and SP9, and the statement of Shamsuddin pursuant to s 112 of the Criminal Procedure Code tendered in open court pursuant to s 32 of the Evidence Act 1950. Before discussing their testimonies, it is necessary that I touch first the veracity of these relevant witnesses, assisted tremendously by the contributions of the learned High Court judge who had had the advantage of listening and observing them. That high vantage was certainly not enjoyed by us.

[70] Needless to say the success of the prosecution depended much on SP 9 as he was the only eye witness who could connect the appellant to the murder. Without him a huge gap would exist in the prosecution's case. Further, no substantive part of his evidence could be accepted by the court unless he had passed the test of his acceptability first as a witness, in the light of his timidity. Here he had not bravely confronted the appellant, who was holding a knife, and who had not hesitated to use it as evidenced by the blood splattered in the lounge and the kitchen. His behaviour and conduct as I saw it, was a man who had surrendered to his inner survival instinct, more so as this timid Indonesian had come to Malaysia to eke out a living. Getting entangled with trouble especially with an enraged man must have been the last thing he wanted. Timidity thus should not be taken against him let alone there is no legal precept in existence which presumes that a timid person has a propensity to lie or embellish his testimony. Here SP9 in crystal clear terms had said that he saw no one stabbing the deceased but holding the knife he did ('Saya tak nampak orang tikam Aminah, tetapi pegang pisau saya nampak.'). He thus had remained within the boundaries of what he saw and heard only and nothing more.

[71] The High Court judge who had witnessed the demeanour of SP9 had correctly remarked:

> Tetapi saya bukan sahaja telah mendengar keterangannya. Saya telah memerhatikan watak dan kelakuannya. SP9 jelas seorang yang kecerdikannya di bawah tahap biasa, jenis yang tiada inisiatif dan keyakinan diri. Di Mahkamah pun dia nampak keberatan menyebut nama tertuduh. Jika tidak masakan dia boleh hanya bekerja menolong SP8 menjual makanan digerainya.
>
> Melihat wataknya alasannya sedemikian rupa kerana takut adalah munasabah, bagi orang sepertinya……

[72] Having scrutinized the evidence I see no reason to disagree with the overall findings and views of the presiding judge regarding this witness. The court had considered the mental capacity of SP9 and had concluded that the latter was a person of below average in intelligence. I see no reason why the testimony of a person of limited intelligence could not be accepted (apart from the factor of timidity). What was important was that his veracity and credibility had withstood the test of the appellant's cross-examination and had weathered it. That being so what SP9 had heard and saw, especially that part of seeing the appellant holding a knife on the left hand, with the other holding the deceased's neck, had pinned down the appellant to the charge.

[73] Admittedly the issue of the non-presence of illegal immigrant witnesses, when required to come forward to testify, could not be divorced from the harsh realities of their wayward world, whence to volunteer evidence would be perceived as a guarantee to a one way passage back to Indonesia at the conclusion of the trial. I saw no justifiability in invoking any adverse inference merely on the failure of the prosecution to secure their attendance in court due to this want of co-operation in the circumstances of the case. The incidence of Shamsudin's kidnapping, and the non-presence of Jumain, an illegal immigrant merely concretized this. All these issues were maturely and realistically discussed by the presiding judge and the views were beyond reproach. From his vantage position the High Court not only had correctly assessed the creditworthiness of the prosecution's witnesses that had come forward to testify but had also supplied a reasoned view for the absence of Shamsudin and Jumain.

OTHER CORROBORATIVE EVIDENCE

Injuries on the appellant

[74] SP7 a doctor at the Kuala Kubu Bharu Hospital had conducted a physical medical examination on the appellant about three days after the incident. He found the presence of injuries on his knees, buttocks and palm, and in the course of the hearing had supplied a reasonable view as to how they could have come about. He viewed that the injury to the palm could possibly having been caused by the uncovered knife when holding it; the superficial scratches on the appellant's thighs were caused by the deceased's struggle when they were 'face to face', and the injuries to the knees when they were scraping the ground when on top of her. All these had been covered by the judge and I saw no reason to disagree with the conclusions.

Free hand of the appellant

[75] At the time when the murder was being committed, there was no one

else in the house as confirmed by SP9, corroborated further by the deposition of Shamsuddin (husband of the deceased). This deposition was tendered pursuant to s 32 of the Evidence Act 1950, and was a statement of a relevant person who could not be found. This statement recorded under s 112 of the Criminal Procedure Code, was made in the course of, or for the purposes of an investigation into an offence (of murder in this case) under a written law (Penal Code).

[76] From the testimonies of the police witnesses it had been clarified that Shamsuddin could not be found as he had been kidnapped by unknown persons. Perhaps conceding to the truth of that clarification, and that all the preconditions had been satisfied it was no surprise that no objection was registered by the appellant as reflected by the notes of the proceedings. A scrutiny of the evidence adduced satisfied me that there was sufficient justification for the admission of Shamsuddin's deposition under s 32 of the Evidence Act 1950. In support of the correctness of the admission of the latter's deposition, suffice if I allude to *DA Duncan v Public Prosecutor* [1980] 2 M.L.J 195 where Raja Azlan Shah CJ (Malaya) (as His Royal Highness was then), delivering the judgment of the Federal Court, when permitting the allusion to a preliminary enquiry deposition, had said:

> Part of the evidence consisted of a deposition at the preliminary enquiry of a witness who could now not be traced. The deposition was admitted over the protest of counsel for the appellant. We are however fully satisfied that sufficient evidence was adduced to *justify the court's admission* of the deposition under s 32 of the Evidence Act 1950.
>
> (Emphasis added.)

[77] The contents confirmed that on the same morning, before the murder, he and Jumain had left the house for work. With everyone out of the way, apart from the unexpected hidden presence of SP9 and the deceased's two-year old child, what with a legal right to be there by virtue of being a tenant, he thus had the opportunity to commit the offence.

Subsequent conduct of the appellant

[78] The action and conduct of the appellant, absconding to the south, hundreds of miles away from the scene of the crime, unfortunately to be arrested at Kota Tinggi, Johore Bahru merely strengthened the prosecution's case. The Evidence Act 1950 provides that the conduct of any party to any fact in issue is relevant. In fact the conduct of any person, an offence against whom is the subject of any proceeding, is relevant if the conduct influences any fact in issue or relevant fact, whether previous or subsequent (s 8 of the

Evidence Act). Under illustration (i) of s 8 it is provided for that if 'A' were to be accused of a crime, the 'facts that after the commission of the alleged crime he absconded... are relevant'.

[79] In the case before us, the uncanny facts of the subsequent conduct of the appellant of absconding to Kota Tinggi after having committed the offence of murder, fits perfectly with the above illustration. By so absconding to Kota Tinggi, it was obvious that the appellant had attempted to distance himself from the scene of the crime. Though that act would not suffice to convict him it would be relevant as it would be indicative of a guilty mind. In *Adikanda Das v State of Orissa* (1988) Cri LJ 1884 Behera J had occasion to opine:

> The only other circumstance relied on by the prosecution was the fact of absconding of the appellant for some years. It is a settled principle of law that absconding may lend weight to the other evidence establishing the guilt of an accused, but, by itself, is hardly any evidence of guilt. The conduct of an accused making himself scarce for some period is relevant under s 8 of the Evidence Act 1950 and may be indicative to some extent of a guilty mind, but it would not be conclusive evidence of his guilt.

[80] With the cumulative evidence before us, I was satisfied that the High Court had correctly found a prima facie case having been established, at the end of the prosecution's case. Thereafter the defence was called.

[81] Come the defence stage, the appellant's defence was incoherent. He attempted to implicate everyone in the incident, in the like of Jumain of whom he alleged had wanted to stab him. In the earlier part of his own testimony he had exonerated Jumain's culpability when he had said:

> Masa saya keluar pagi itu Jumain tak ada lagi diruang tamu. Masa saya bangun Shamsudin dan Jumain sudah pergi kerja (When I went out that morning Jumain was not at the lounge. When I woke up Shamsudin and Jumain had gone to work)

[82] He also had said that the killer was 'unknown to him'. As the hearing went on he tried to implicate Jumain, perhaps having forgotten that he had made the above statement clarifying that Jumain had left (which tallied with Shamsudin's documented deposition affirming that he went out of the house with Jumain earlier). At the tail end of his testimony the appellant accused the now 'identifiable' Jumain as the person who wanted to stab him (again contradicting himself when earlier he had stated that he knew not the killer). It was thus plain and obvious that lying and switching of his stories was second nature to the appellant.

[83] Even at the early stage of the hearing i.e. the prosecution's stage, he

had launched his future defence when he had suggested during the cross-examination of SP9, that he had attempted to seduce the deceased with Jumain. This desperate shot in the dark approach was abandoned subsequently as this line of defence was never pursued at the defence stage.

[84] The above only defence, which merely focused on Jumain, unwittingly had absolved SP9 of any involvement with the murder. This very witness who would pin-point the appellant as the murderer thus had supplied a testimony that was beyond criticism as his credibility and neutrality was never put to the test.

[85] What was undeniable was that on that fateful day and time, by his very own admission, he was in the house when the commission of the offence was in progress. By all accounts he had ironically strengthened the prosecution's case, not merely by that admission, but also by his plainly obvious attempts to push the blame to someone else. This advertence of the defence of outright denial had unfortunately caused him to 'forget' to deal with the prosecution's other strands of evidence, thus resulting in him failing to dent the prosecution's case. He never even explained what he was doing crawling on top of the deceased with a knife in hand. He did, at one stage attempt to explain why he had stab wounds, bruises etc. all over his body, in that they were caused by the supposed amorous Jumain but I found his explanation inconsistent with the other evidence. To put it bluntly Jumain could not have caused the injuries as he was never present during the murder incident. He had already left for work as confirmed by Shamsudin's deposition, SP9's exonerating testimony, and by the appellant's very own admission that Jumain had already left for work with Shamsudin that morning.

[86] To recapitulate on the facts, the deceased together with her family had rented out one of the rooms in a five bedroom wooden house from SP8. Her family comprised her husband, identified by the other witnesses as Shamsuddin, and a two-year old child. That left out four other rooms. Out of those four rooms, two rooms were left vacant whilst one was taken up by the appellant, with the other being rented out to SP9 (Ahmad Jumah), the prosecution's main witness. On that fateful day SP9 was awakened by a scream crying out for help. Surreptitiously he had peeped through the door which was slightly ajar and saw the appellant holding a knife in the palm of his left hand. The deceased was on her back whilst he was 'crawling' (merangkak) on top of her. He also witnessed the appellant holding the deceased's neck. At that material moment the deceased was still clothed in a yellow dress, with the appellant only wrapped in a green towel but shirtless. SP 9 also saw no one else at the lounge. Due to fear, and instead of going out of his room to assist the victim, he had sneaked out through the window and

had run away all the way to the top of the nearby hill. Sometime later he descended and reentered the house at about 7.30am. This time the lounge was empty. In fact the house was empty except for the lifeless deceased's body which now was at the kitchen (and not in the lounge as was last seen). The deceased now was unclad except for the brassiere and underwear. Blood was seen splattered at several places. He quickly grabbed a shirt and proceeded to Jamiliah's (SP8) shop, ie his place of employment. Even at that shop he maintained his silence. During the trial he had identified the appellant and the deceased.

[87] Though SP9 did not see the act of the appellant causing the injuries, which caused the eventual death, the cumulative effect of the total circumstantial evidence, pointed unerringly to his guilt. Waikar J in *Tulshiram v State of Maharashtra* (1984) Cr LJ 209 had occasion to say:

> The law on circumstantial evidence is clear and we need not restate it. Suffice it to say that all the circumstances established must unerringly point to the guilt of the accused and that they must be consistent and consistent with the guilt and inconsistent with the innocence of the accused. What is important is the cumulative effect of all the circumstances

[88] At the stage of the defence the appellant had squandered away his life when he submitted the most improbable defence in the form of mere denial and shifting the blame to Jumain. Yet all the evidence, and it was obvious to all and sundry, that Jumain was never in the house at the time of the offence. This defence format when tested against the totality of the evidence adduced by the prosecution at best was a desperate attempt by the appellant to extricate himself from an impossible position. All the evidence therefore when bound together, inclusive of the most innocuous strand like the return of SP9 to the house not too long thereafter, where he saw the body of the deceased in the kitchen, irresistibly pointed to the guilt of the appellant. The last person he saw with the deceased was the appellant.

[89] To wind it up, from the totality of the evidence I was satisfied that at the end of the trial the prosecution had proven its case beyond reasonable doubt. I thus had no difficulty in dismissing the appeal. The conviction and sentence by the High Court are affirmed.

Hasan Lah JCA:

[90] I have had the advantage of reading the judgments of both my learned brothers Mohd Ghazali and Suriyadi JJCA in draft and I agree with the views expressed in their judgments.

Appeal dismissed. High Court's Conviction and sentence affirmed.

Reported by Sally Kee